APPENDIX

BOARD OF TAX APPEALS
STATE OF OHIO

Case No. 93-G-1032

SERENE G. SHAPER,
Appellant,

vs.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Appellee.

Tuesday, April 19, 1994

Met, pursuant to assignment, at 1:40 o'clock p.m.

BEFORE: Linda Moss-Edwards, Attorney-Examiner.

APPEARANCES:

ON BEHALF OF THE APPELLANT:

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ON BEHALF OF THE APPELLEE:

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CROSS-EXAMINATION

BY MR. DE LONE:

Q Mr. Sherman, you're an attorney?

A Yes.

Q Admitted to the Ohio Bar when?

A 1974. Autumn of '74.

Q Okay.

A I'm sorry. That's a mistake. That's when I got out of undergraduate. It would be autumn of '76.

Q And you examined the—Well, let me ask you: You were not the internal auditor that was requesting this information concerning this application for refund, were you?

A That's correct.

Q That was Mr. Bialczak?

A No, it wasn't Mr. Bialczak. The internal auditors were requesting information prior to Mr. Bialczak. My understand is they made the first request, and subsequently Bialczak made a request.

Q Then Bialczak made another request, and this is a letter dated April 129, 1993 which is, I believe, page 42 of the Statutory Transcript?

A I can't confirm that.

Q I understand, but you're familiar with that letter?

A Yes, sir.

Q You saw it?

A Yes, sir.

Q And you are familiar with the application for tax refund filed by Ms. Shaper?

A Yes, sir.

Q And fundamentally, what you're really saying is, isn't it, when you talk about mathematical errors, that in order to determine the amount of refund, if a refund was applicable, you needed to verify the amount she claimed as both interest income on these particular securities and the amount of tax she paid, Ohio tax?

A We would verify the numbers, yes, relating to that.

Q Sure. Now, you did examine the return, and, presumably, other members of the department examined the application for refund?

A Oh, you're asking me that?

Q Sure.

A At the time that the refund request first came to our building, no, I did not examine that at that the time.

Q Somebody actually did, however?

A My understanding is that at least two somebodies did, two agents.

Q And you have since seen it?

A Yes, sir.

Q And from the standpoint of the issues, that is whether or not it's in violation of Section 8 of Article 1 of the Constitution of the United States that is the statute giving exempt status to Ohio securities—municipal securities and the other issues concerning class action refund claims, this information that the department personnel wanted would have no bearing whatsoever on the determination by the Commissioner of those two issues, would it?

A I'm sorry. Could you restate the question? I'm not sure I understand.

Q The additional information requested by the department's staff auditors would have no bearing whatsoever, would it, on the allowance or disallowance of the refund claim based on the two issues raised by the taxpayer?

A Those two issues again are?

Q The Commerce Clause, which was raised in the Notice of Appeal—The federal constitutional questions, let's put it that way, equal protection and Commerce Clause and the question of the statute that you operate under with regard to refund which you believe does not permit you to handle class applications.

A Right. The documentation we requested would not have addressed those two issues.

Q So it was immaterial at that point unless the department was going to grant the refund, and then you would need to know how much money the lady was entitled to?

A When we are going to issue a refund—

Q Sure.

A —we would need documentation.

Q Do you have any idea who in the department's legal staff wrote the Commissioner's final determination order?

A Who actually wrote it?

Q Yes.

A I have an understanding, but I can't tell you who actually wrote the final determination.

Q Who do you think wrote it?

A That Hearing-Examiner Bialczak was involved with the writing on that.

Q Isn't it common practice when the legal department drafts tentative determinations where they are denying the taxpayer's or—yes, the taxpayer's petition, whether it be in an assessment or refund, that the examiner generally puts in what is sometimes referred to in the practice as "the kitchen sink," in order to put the Tax Commissioner in the best position to be upheld by the Board or the courts?

A I really can't speak to what is the common practice in the legal division with respect to denying refunds.

Q But you know that happens, what I just said?

A I can't say that it always happens or never.

Q But it does?

A I would imagine it has probably happened.

Q But certainly to decide the issues, and if you look at the application for refund, the issues are clear that the Tax Commissioner is raising, aren't they, the constitutional challenge and the class refund claim?

A As with the taxpayer?

Q Yes.

A Before I definitely say it, I would like to reread it.

Q Sure. I think that's a copy of what we filed that's in the transcript (indicating).

A The first challenge is the Commerce Clause challenge, differential treatment of United States Bond.

Q Go ahead.

A The second says, "Commerce Clause" here, and the No. 2 as far as—Reason No. 2 is called the class refund claim.

Q So that was clear?

A Yes.

Q And this application could have been simply turned down on the basis of Herrick versus Kosydar and on the basis of the cases that were cited in the Tax Commissioner's final determination with respect to the federal constitutional challenge; isn't that true?

A We ask for documentation to support the refund.

Q Isn't it true that the Commissioner could turn it down on the basis he has no authority to rule on the constitutional issue and on the basis that the statute doesn't provide for class action refunds?

A I don't know if I can really answer that question.

Q Okay. That's all right.

MR. DE LEONE: Let me see if I have anything else, Ms. Edwards. I think I'm about through.

BY MR. DE LEONE:

Q From what you can see in the Statutory Transcript, is there any doubt that Ms. Shaper held this type of bond in question?

A I think there is significant doubt because the documentation isn't there to support what she did.

Q Are you only requesting documentation with respect to income from the bond?

A That is what she's asking—That is what she's using as the basis for her refund.

Q And the return showed, that is the Ohio return, that income, and she paid the tax on it, didn't she?

A The originally filed return showed an item of about $17,000-some-odd as non-Ohio interest.

Q And the department didn't question whether she owned the bonds at that time, did they, they took the money?

A Well, whenever an initial return is filed, we do not, at that time, question it. We question many returns later, but not at the time.

Q Okay. Of course, the application was executed by her under penalties of perjury?

A I can't confirm that because I don't know her signature. It indicates to be her signature.

MR. DE LEONE: That's all. Nothing further.

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